Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS,

Petitioner,

v.

SOUTHWESTERN BELL WIRELESS, INC., fka SOUTHWESTERN BELL MOBILE SYSTEMS, INC., as General Partner of Kansas City SMSA Limited Partnership; and KANSAS CITY SMSA UNLIMITED PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One:

Is a zoning regulation intended to protect the fundamental public safety communications of local government from interference by telecommunications towers impliedly preempted under the Federal Communications Act of 1934, as amended, by the authority of the Federal Communications Commission, *or* may a local government regulation reasonably limited to protection of public safety operations constitutionally coexist with federal regulation?

Question Two:

Does the Tenth Amendment to the United States Constitution limit the Federal power to preempt, by implication, regulations intended to support and protect the fundamental public safety operations of local government?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Cellular Telecommunications Industry Association was an Amicus Curiae before the district court, but was not a party before the court of appeals.

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Petitioner, the Johnson County Board of County Commissioners (Petitioner), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Southwestern Bell Wireless, Inc. v. Board of County Commissioners*, 119 F.3d 1185 (10th Cir. 1999) (App. A). The opinion of the United States District Court for the District of Kansas is reported at *Southwestern Bell Wireless, Inc. v. Board of County Commissioners*, 17 F. Supp. 2d 1221 (D. Kan. 1998) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 27, 1999 (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution provides in relevant part: "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State of the Contrary notwithstanding."

The Tenth Amendment to the United States Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

47 U.S.C. § 332(C)(7)(A) provides:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

STATEMENT OF THE CASE

This is a federalism case, questioning whether federal law impliedly preempts local government authority to prescribe procedural, not substantive, safeguards for its public safety communications system and the premise that non-conflicting procedural regulations of local government, on matters of inherent local government concern, merit constitutional recognition and can lawfully coexist with federal regulation. The case arises from an attempt by Petitioner to impose a zoning regulation designed and intended to protect the vital communication channels of public safety agencies, including police, fire, and emergency services, from interference by transmissions from telecommunications towers. Respondent, Southwestern Bell

Wireless, Inc. (Respondent), challenged the zoning regulation in the United States District Court for the District of Kansas, asserting federal law issues in its initial complaint and on motion for summary judgment. Petitioner asserted these federal law issues in its answer and its reply to the motion for summary judgment. The following background discussion sets forth the facts material to consideration of the questions presented to the Court.

A. Background to the District Court Decision

Johnson County, Kansas, is a suburban area of approximately 400,000 people and comprises a major portion of the Kansas City metropolitan region. Petitioner is the governing body for the County, a municipal government of the State of Kansas, and provides local government services to its citizens. These services include the basic, fundamental services of local land use and zoning, police and law enforcement, fire prevention and protection through established fire districts, and emergency medical response and transportation. Each of these services is essential to the public safety and welfare and is inherent in the powers and authority of local government.

An essential element for police, fire and emergency service operations is an effective emergency communications system. Without effective communications, public safety agencies and personnel cannot adequately respond to public safety situations. Without effective communications, the dedicated men and women who risk their lives for the public good are exposed to greater, and unwarranted, risks for their own safety and the safety of the public.

During the early to mid-1990's, the telecommunications industry was rapidly growing. The Congress and the Federal Communications Commission (FCC) were taking various actions to meet those growth demands and to allocate more radio frequencies for use by that industry. One of those actions was to reallocate frequencies previously reserved for public safety agencies.

Johnson County, as well as most other municipalities, experienced a significant increase in the number of zoning applications seeking to locate and construct communication towers. The Congress had, in the Telecommunications Act of 1996, expressly declined to preempt local zoning authority over the towers. In response, the Petitioner directed its staff, in June, 1996, to review the County's zoning regulations and to draft amendments to better address the zoning issues for communication towers.

One of the primary issues considered by the Petitioner was the probability that transmissions from the various proposed towers would cause distortion and interference to the communications systems of local government public safety agencies. The Petitioner concluded that public safety operations were essential to local government interests and that public safety could not be compromised by zoning decisions on the location of communication towers. Therefore, a zoning regulation amendment was proposed which required that (1) communication towers operate in full compliance with all regulations and requirements of the FCC, and (2) tower operators ensure that towers were located and operated in a manner that did not cause interference with or disruption to public safety communications such as police, fire and emergency services. Furthermore, the proposed zoning regulation provided a procedure, in the event that a

tower did cause interference with or disruption to public safety communications, for the tower operator to investigate and remedy the problem.

In its process of developing the regulations and procedures, the Petitioner did consult with representatives of several telecommunications companies, including Respondent. Furthermore, prior to adoption of the regulations, during its public hearing process, the Petitioner did contact the local Kansas City office of the FCC to inquire about the FCC procedures for investigating and resolving interference issues related to public safety operations. The FCC District Director informed the Petitioner that (a) due to limited resources, he could not commit to FCC action on interference issues within a short period of time; (b) the FCC procedures for investigating and resolving interference issues involved a self-help remedy which utilized an investigation by technicians of both the complaining party and the suspected interfering party; and (c) some incidents of interference may not be subject to FCC action. Based upon the comments from the companies and the FCC, the Petitioner revised its proposed zoning regulation to structure the procedures in a manner consistent with those used by the industry and the FCC.

Then, in June, 1997, representatives of the FCC in Washington D.C., after having been contacted by Respondent, contacted the Petitioner to discuss the Petitioner's proposed zoning regulations. Again, revisions were made to the zoning regulation to reflect comments made by the FCC.

On June 25, 1997, the Petitioner adopted the zoning regulations challenged in this case. Those regulations

contained provisions that (1) required the tower operator to comply with all regulations and requirements of the FCC; (2) required that towers be located and operated in a manner that prevented distortion or interference with public safety communications; and (3) required tower operators to follow specified procedures to investigate and remedy interference problems with public safety communications.

The regulations, as adopted, do not attempt to regulate any portion of the operations of the communication tower. They do not establish any technical standards, nor any licensure requirements for broadcasting. They are not substantive regulations. They are primarily procedural, and those procedures are consistent with procedures utilized by the FCC. Furthermore, the regulations are narrowly drawn, applying only to the essential interest of local government in performing its public safety duties. The regulations do not apply to any interference issues with private users, other broadcasters, or consumer electronics. Nevertheless, on July 2, 1997, after adoption of the regulations, the Chief of the Commercial Wireless Division of the FCC notified the Petitioner by letter that he considered the adopted regulations to be preempted by federal law.

On August 21, 1997, the Petitioner approved Respondent's application for a conditional use permit to construct and operate a 150 foot monopole communication tower. Under the permit, Respondent will transmit at frequencies within the band utilized for the public safety radio system operated by the Petitioner. Expert consultants retained by the Petitioner advised the Petitioner that telecommunication systems such as that of Respondent can cause substantial interference with the Petitioner's public safety communications and that a very real possibility existed for such interference to occur.

The conditional use permit granted to Respondent contained the requirements of the zoning regulation related to interference with public safety communications. Respondent objected to those provisions of the permit, and, in September, 1997, Respondent filed its Complaint in the United States District Court for the District of Kansas seeking declaratory and injunctive relief. In May, 1998, Respondent filed a motion for summary judgment, contending that the Petitioner's regulation was unlawful and void due to the exclusive jurisdiction of the FCC over matters of interference, which preempted the power of the Petitioner to adopt its regulations.

In August, 1998, the District Court granted Respondent's motion. The District Court concluded that there was no express preemption. However, the Court held that the Petitioner's zoning regulation was impliedly preempted because (a) federal law so thoroughly occupied the field that there was no room for local regulation; and (b) the Petitioner's regulation conflicted with federal law regulations.

On September 25, 1998, the Petitioner filed a Notice of Appeal to the District Court decision. On appeal, the Petitioner asserted the federal law issues that its regulations were not preempted, that local government regulations on public safety matters were entitled to a presumption of validity and could coexist with federal regulation, and that the Tenth Amendment to the U.S. Constitution limited the federal power to preempt local authority on matters inherent to local government.

B. The Proceeding Below.

The United States Court of Appeals for the Tenth Circuit (Court of Appeals) invoked jurisdiction under 28 U.S.C. § 1291. On December 27, 1999, the Court of Appeals entered its Judgment to affirm the decision of the District Court. The Court of Appeals held that (i) the interference resolution provision of the zoning regulations is impliedly preempted by federal law, (ii) this preemption does not violate the Tenth Amendment, (iii) the District Court's order is not overbroad, and (iv) the District Court did not otherwise err.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, NOT PREVIOUSLY DECIDED DIRECTLY BY THIS COURT, WHICH IMPLIEDLY PREEMPTED A LOCAL GOVERNMENT ZONING REGULATION INTENDED TO PROTECT ITS PUBLIC SAFETY OPERATIONS WITHOUT CONSIDERING WHETHER THE LOCAL REGULATION COULD CONSTITUTIONALLY COEXIST WITH THE FEDERAL LAW REGULATIONS.

The Petitioner's petition for a writ of certiorari should be granted because the opinion below decided an important federal question by concluding that the Petitioner's zoning regulation was impliedly preempted by the comprehensive nature of the federal regulatory scheme developed under the Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, as amended. This Court has not directly ruled on the

implied preemption of a zoning regulation under that Act. Furthermore, the court below reached its decision without consideration of whether the local regulation could constitutionally coexist with the federal law regulations. This Court should decide that issue; that is whether implied preemption analysis firmly requires a determination of whether the local regulation can constitutionally coexist with the federal regulation. This Court has often recited the "familiar and well established principles" that guide consideration of preemption issues. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). At the same time, this Court has adopted a more deliberate consideration applicable to an implied preemption analysis of local government regulations which relate to matters of health and safety, since "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 719 (1985). In such instances, there is a recognized presumption that local regulations are "not invalidated under the Supremacy Clause", *Id.* at 715, and can normally coexist with federal regulation, . . ." *Id.* at 718. Therefore, a finding of implied preemption would require "a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the Federal scheme, that is strong enough to overcome the presumption the State and Local regulation of health and safety matters can constitutionally coexist with Federal regulation." *Id.* at 716.

This recognition of regulatory coexistence is applicable to the circumstances involved in this case. The court below made no analysis of whether the Petitioner's zoning regulation, designed and intended to prevent interference with the operation of its public safety agencies and personnel, could constitutionally coexist with the regulatory scheme

established by the Federal Communications Commission. Petitioner respectfully submits that its regulation can coexist with the federal regulation. Briefly, without elaborate argument, the Petitioner believes that this Court should determine constitutional coexistence for the following reasons:

1. The regulation is a condition of zoning, which is a power expressly preserved to local government under the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(A);

2. The regulation does not substantively regulate in the federal area of concern. It does not set technical standards, operational requirements, licensing matters, or any other matter within the expertise or regulations of the FCC;

3. The regulation is procedural only and the procedures are generally consistent with the federal scheme;

4. The regulation is narrowly drawn, applying only to interference with public safety. It does not attempt to regulate interference issues with any other person, entity, equipment, or consumer products;

5. The regulation serves the exact same purposes of the federal regulation concerns; and

6. The regulation does not impact national uniformity issues since communication tower operators must deal locally on the site and interference circumstances in any event.

This issue is fundamentally important to public safety operations of local government. This Court has recognized the principle of regulatory coexistence, which was not

considered by the court below. This Court should grant the petition of the Petitioner, review the regulatory issues in this case, articulate the permissible scope of coexistence, and determine whether the Petitioner's regulation can constitutionally coexist with the federal law regulations.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT IN DETERMINING WHETHER THE TENTH AMENDMENT LIMITS THE POWER OF FEDERAL LAW IN PREEMPTING, BY IMPLICATION, THE AUTHORITY OF LOCAL GOVERNMENT TO ADOPT REGULATIONS INTENDED TO PROTECT THE ABILITY OF ITS PUBLIC SAFETY AGENCIES TO PERFORM ESSENTIAL SERVICES.

The petition of the Petitioner for a writ of certiorari should be granted so that this Court may consider and rule upon a fundamental issue of federal constitutional law; that is, whether the Tenth Amendment to the United States Constitution limits the power of the federal government to preempt, by implication, the power of a local government to adopt regulations designed and intended solely to protect the ability of local government to perform its traditional public safety services. Petitioner is not aware of any decision of this Court that has addressed that issue.

Numerous cases, of course, have addressed issues related to the balance of power between the federal government and its constitutionally enumerated powers and the powers

reserved to the States under the Tenth Amendment. *See, e.g.*, the discussion in *New York v. United States*, 505 U.S. 144, 160 (1992) and in *Gregory v. Ashcroft*, 501 U.S. 452, 457-464 (1991). As acknowledged in those discussions, "[t]he Court's jurisprudence in this areas has traveled an unsteady path." *New York v. United States*, *supra* at 160.

The Petitioner does not here contend that the Federal Communications Act or its subsequent amends was an unauthorized exercise of the powers of Congress or the FCC. On the contrary, the Petitioner acknowledges and respects the national interests regulated by the federal laws and regulations. Nor does the Petitioner contest that it is itself subject to those laws and regulations for the licensing and operation of its communication systems.

The Petitioner does, however, respectfully suggest that there are limits to the consequential affects of those federal regulations. Where the federal regulations have the affect of limiting the ability of local government to adopt regulations that prevent persons from directly interfering with the actual functions and performance of fundamental local government operations, then the reserved powers under the Tenth Amendment must be given more meaningful application. Otherwise, the inherent powers of government to function are compromised.

In one line of its Tenth Amendment jurisprudence, this Court has sustained the exercise of powers by the federal government in applying its federal law regulations of interstate commerce to the operations of State and Local governments. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The rationale supporting those decisions is based upon two factors:

(1) the regulations are of general application to both governmental and private entities; and (2) the regulations have a limited impact upon governmental sovereignty. In a more recent line of cases, this Court has looked for a "clear statement" of federal intent to regulate state or local governments and to displace local government sovereignty. *See Gregory v. Ashcroft*, *supra*, at 461. Finally, this Court has also recently refused to allow the federal government to "commandeer" State or Local government operations for federal regulatory purposes. *See, e.g., New York v. United States, supra*, at 161.

Those decisions do recognize some measure of limitation on the powers of federal government arising from the Tenth Amendment. The County would respectfully suggest that a limitation should be recognized in this case, and would propose that a standard analogous to the rationale behind *Garcia*, *supra*, be adopted, whereby local government regulations lawfully adopted pursuant to the inherent police powers, which apply narrowly to serve the direct, fundamental operations of the local government and which have a limited impact upon a federal government interest are protected from preemption by federal law regulation to the extent that there is no actual, direct conflict between the local and federal regulations.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS WITH LEGAL PRINCIPLES ESTABLISHED BY THIS COURT AND ERRONEOUSLY CONCLUDED THAT A LOCAL GOVERNMENT REGULATION WAS IMPLIEDLY PREEMPTED BY FEDERAL LAW FIELD PREEMPTION.

The Petitioner's petition for a writ of certiorari should be granted because the court below erroneously concluded that federal law had so occupied the field of regulation on radio frequency interference that a local government regulation, reasonably limited to protect public safety communications was implied preempted. In reaching that conclusion, the court below not only erred in its findings, but if failed to consider and apply legal standards articulated by this Court.

In *Hillsborough County v. Automated Medical Labs, supra*, at 717, this Court stated:

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of

> course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. (citation omitted).

That standard is even more appropriate in cases such as this one which involve local government regulations related to public safety operations. As the *Hillsborough* Court further stated: "Given the presumption that State and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety." *Id.* at 718.

This Court did indicate that it would expect an agency to speak if it intended its regulations to be exclusive, and the court below did place some reliance on pronouncements of the FCC. However, the FCC does not have any regulation on preemption, did not conduct in rule making proceedings or issue any directive. The FCC pronouncements are open to reasonable argument. The court below, however, did not follow the standards set by the Court in *Hillsborough*.

In addition, the opinion below, based upon field preemption, concluded that the Petitioner's regulation was preempted by the comprehensive federal scheme. The Petitioner acknowledges that the Communications Act, as amended, and its regulations are extensive. However, this Court should review this case and determine whether the Petitioner's regulation fell within the scope of the field pre-emption.

Clearly, the Communications Act and its regulations do not comprehensively occupy the entire field. Indeed, the Act

itself, 47 U.S.C. § 332(c)(7)(A), expressly preserves to local government the power to zone communication towers. Likewise, this Court in *Head v. New Mexico Board*, 374 U.S. 424 (1963) found that a state advertising statute was not pre-empted under the act. Thus, substantial portions of the field are not exclusive.

The court below concluded that the regulation of radio frequency interference was within the exclusive jurisdiction of the FCC. However, the County regulation does not regulate any technical nor equipment matter and does not regulate interference generally. It is a procedural regulation for the investigation and resolution of interference issues related solely to the County's public safety operations.

This Court, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), declined to preclude a state law remedy even though federal law had preempted state regulation of nuclear plants. The same determination would be more appropriate in this case, since the procedural "remedy" does not involve a separate court action and is reasonably consistent with the federal law objectives.

The Petitioner's petition for a writ of certiorari should be granted for this Court to review and determine whether field preemption applies in this case, whether the County regulation falls within that field, and whether the County's regulation, as a procedural remedy for local government public safety operations is permissible. As this Court stated in *Silkwood*, *supra* at 251, 253-54, "preemption should not be judged on the basis that the federal government has so completely occupied [a] field . . . that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the [remedies] . . . would frustrate the objectives of federal law."

CONCLUSION

The issues presented in this case are of great importance to local government and to the dedicated men and women who daily commit their time and efforts to provide public safety services to the citizens of their community. In the legal sense, the issues in this case present important issues on the balance of power between the federal government and local government, to determine whether a zoning regulation, designed and intended to protect local government public safety communications from interference, is impliedly pre-empted by federal law regulations.

If the opinion below is allowed to stand, local government will lose the ability to establish reasonable limited procedures to ensure that its basic and fundamental public safety operations can communicate and function effectively. The Petitioner will be dependent upon non-local, federal procedures to resolve instances of interference with public safety operations, instances that can and will concur. While the court below took pains to note that the Petitioner would have a remedy for interference, citing various federal code provisions, those remedies are illusory and, respectfully, of little comfort to the police, fire and emergency service providers who are on the streets and dependent upon communication. Indeed, it is ironic that the court below references the general complaint procedures and then also cites letters of understanding under which the FCC agrees to allow industry associations do the interference investigations and cooperative problem-solving.

More importantly, this Court can remedy that decision and in the process establish more clearly an important principle of implied preemption analysis — regulatory

coexistence. In so doing, the Court will restore a proper balance in federal and local government regulatory activities and ensure the legitimate and fundamental objectives of both the local government and the federal government.

The Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and review the decision of the court below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED DECEMBER 27, 1999

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-3264

SOUTHWESTERN BELL WIRELESS INC., fka Southwestern Bell Mobile Systems, Inc. as General Partner of Kansas City SMSA Limited Partnership and KANSAS CITY SMSA LIMITED PARTNERSHIP,

Plaintiffs – Appellees,

v.

JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant – Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. NO. CV97-2481-GTV)

* * *

Before **ANDERSON, McWILLIAMS,** and **BALDOCK,** Circuit Judges.

ANDERSON, Circuit Judge.

Appendix A

Plaintiffs, referred to collectively herein as SW Bell,[1] brought this suit against the Board of County Commissioners of Johnson County, Kansas ("BOCC"), seeking a declaration that federal law preempts a county zoning regulation involving radio frequency interference[2] ("RFI"), and an injunction against enforcement of the regulation. The district court granted summary judgment in favor of SW Bell, invalidating the regulation as impliedly preempted by federal law and implicitly rejecting the BOCC's contention that such preemption violates the Tenth Amendment's reservation of state powers. The BOCC challenges those conclusions, and also contends that the court's order is overbroad, and that issues of fact preclude summary judgment. For the reasons stated below, we agree with the district court and hold that (1) the BOCC's RFI regulation is impliedly preempted by federal law, (2) this preemption does not violate the Tenth Amendment, (3) the district court's order is not overbroad, and (4) the district court did not otherwise err. Accordingly, we affirm.

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1. Plaintiffs include Southwestern Bell Wireless Inc., f/k/a Southwestern Bell Mobile Systems, Inc., as general partner of Kansas City SMSA Limited Partnership, and Kansas City SMSA Limited Partnership.

2. RFI occurs "when a signal radiated by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another and desired signal or causes malfunction of some other electronic device." H.R. Conf. Rep. No. 97-765, at 21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2265.

Appendix A

I. BACKGROUND

The BOCC exercises planning and zoning authority in the unincorporated portions of Johnson County, Kansas. SW Bell holds a license from the Federal Communications Commission ("FCC" or "Commission") to construct and operate a wireless telecommunications network in the Kansas City Metropolitan Area including Johnson County. Wireless communications are transmitted by radio at a frequency assigned by the FCC. Pursuant to its FCC license, SW Bell is obligated to provide wireless telecommunications services to its customers. The county public safety departments (including police and fire) also broadcast over emergency frequencies assigned by and under licenses from the FCC.

On March 21, 1997, SW Bell, acting on behalf of William L. and Marilyn M. Wolff, applied to the BOCC for a conditional use permit to construct a 150-foot monopole communications tower for use by SW Bell on the Wolffs' property in unincorporated Johnson County. On August 21, 1997, the BOCC approved the conditional use permit subject to certain restrictions including one entitled "Interference with Public Safety Communications" ("Interference Stipulation"). *See* OL-CU7714, Stipulation 15; Complaint, Appellant's App. Vol. 2 at 155. The Interference Stipulation nearly replicates a zoning regulation amendment adopted by the BOCC on June 26, 1997 ("Interference Regulation"). Under the Interference Regulation, communication towers and antennae cannot operate in a manner that interferes with public safety communications. *See* Johnson County Zoning & Subdivision Regs., art 23, § 6(B)(4)(f). The Interference Regulation grants the county's zoning administrator authority

to determine when interference exists and, after proper notice and opportunity for a hearing, to force the antenna site to cease operations. The Interference Regulation provides, in pertinent part, as follows:

> 2) [The permit holder] *shall be responsible, immediately upon notification by the Zoning Administrator or the public safety agency*, to *investigate* the cause of the interference, disruption, or degradation and to determine a method . . . to *remedy* the problem.
>
> . . .
>
> 3) [The permit holder] *shall*, within 24 hours after receiving notice of the disruption, *remedy the problem or show to the satisfaction of the Zoning Administrator* that the tower or other site equipment is not the cause of the interference or disruption. If the interference . . . causing the functional interruption is not remedied within the 24 hours, then the *Zoning Administrator may upon two days written notice to the [permit holder], set a hearing to show cause why the applicable Permit shall not be terminated and the site . . . shall not cease operation* until the problem is remedied. The hearing shall be temporarily stayed [for two days], however, if the [permit holder] seeks immediate technical assistance and advice . . . from the FCC.
>
> . . .

> 5) [The permit holder] shall be responsible for the payment of costs to cure the interference . . . including the fees of any experts retained to identify or correct the problem . . . .

Id. § 6(B)(4)(f) (emphasis added).

Before adopting the Interference Regulation, the BOCC was aware of FCC authority and regulations in the RFI area. On June 1, 1997, county staff had a telephone conference with local FCC staff regarding the resolution of possible interference with public safety communications. Apparently, the county felt the FCC could not resolve interference issues as quickly as the county wanted. *See* Appellant's Br. at 5, ¶ 13. Additionally, on about June 18, 1997, after contact from SW Bell, an FCC representative from Washington, D.C., telephoned the Johnson County Legal Department and requested an opportunity to discuss the Interference Regulation. Further, SW Bell and other wireless communications providers participated in public hearings and provided written comments about the Interference Regulation and "argued that the BOCC was without authority to adopt such a regulation because, under federal law, the regulatory authority governing this aspect of wireless telecommunications services is exclusively reserved to the FCC, and pursuant to such authority, the FCC has already adopted regulations governing radio-frequency interference." Pls.' Compl. at 5, ¶ 24; Appellant's App. Vol. I at 6.

On July 2, 1997, after adoption of the Interference Regulation but prior to the BOCC approval of the SW Bell permit with the Interference Stipulation, David L. Furth,

Commercial Wireless Division Chief of the FCC's Telecommunications Bureau, wrote to Roger Kroh, Johnson County Director of Planning and Development. Mr. Furth stated that the Interference Regulation was preempted by the Communication Act of 1934 as amended, 47 U.S.C. §§ 151 et seq., citing legislative history and case law. In addition, he advised Mr. Kroh of the FCC procedures currently in place to handle public safety interference complaints, including a twenty-four hour emergency FCC contact number.

II. DISCUSSION

We review summary judgment rulings de novo, applying the same standard as the district court. *See Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997). Summary judgment is proper under Fed. R. Civ. P. 56(c) if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Id.*

A. Preemption

The BOCC argues that the district court erred in determining that federal law preempts the Interference Regulation. Congress has the power to preempt state and local law under the Supremacy Clause, which states that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const. art. VI, cl. 2. Congress's preemption power extends over both state and local ordinances. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). Federal law preempts state or local law in three situations:

> (1) express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law . . . ; (2) field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it; and (3) conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 486 (10th Cir. 1998) (considering preemption of local zoning ordinance) (citing *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996)). The Interference Amendment (and thus the Interference Stipulation) is invalid if preempted by federal law.

1. Express Preemption

To find express preemption, Congress must have explicitly stated by statute its intent to preempt state and local regulation of RFI issues. The district court found no express preemption of RFI issues but found both field and conflict preemption by federal communications law. We agree that federal communications legislation lacks any statement expressly preempting local regulation of RFI. *See also In re Freeman*, 975 F. Supp. 570, 573 (D. Vt. 1997) (finding no express preemption of RFI regulation). Thus, we next examine whether the Interference Amendment is

impliedly preempted by exclusive federal occupation of the RFI field.

2. Field Preemption

"In the absence of an express preemption provision, state or local law may be preempted if it attempts to regulate conduct in a field that Congress, by its legislation, intended to be occupied exclusively by the federal government." *Mount Olivet*, 164 F.3d at 487 (citing *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

> Field preemption may be inferred if a federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it or if an Act of Congress touches a field in which the federal interest is so dominant the federal system is assumed to prohibit enforcement of state laws on the same issue.

Id. at 487 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). We examine three aspects of federal communications law to determine whether and to what extent federal law preempts local regulation of RFI issues: Congressional legislation, agency regulation, and agency adjudication.

Congress, in the Communications Act of 1934, created a "unified and comprehensive regulatory system for the [broadcasting] industry." *National Broad. Co. v. United States*, 319 U.S. 190, 214 (1943). Congress stated that a purpose of the act was "to maintain the control of the United

States over all the channels of radio transmission." 47 U.S.C. § 301. The Act created the FCC and empowers it to regulate radio communications including "technical and engineering aspects."[3] *National Broad. Co.*, 319 U.S. at 215; *see also Head v. New Mexico Bd. of Exam'rs*, 374 U.S. 424, 430 n.6 (1963) (noting FCC's exclusive jurisdiction over technical matters regarding radio signal transmission). The Communications Act applies to "all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States." 47 U.S.C. § 152(a).

In 1982, and again in 1996, Congress significantly amended the Act. In the Communications Amendments Act of 1982, Congress gave the FCC the explicit authority to regulate home electronic equipment with the potential to cause RFI. *See* 47 U.S.C. § 302a(a). The House Conference Report that accompanied the 1982 Amendments clarified that "exclusive jurisdiction over RFI incidents (including pre-emption of state and local regulation of such phenomena) lies with the FCC." H.R. Conf. Rep. No. 97-765, at 23 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2267. It stated further that:

> [s]uch matters [involving RFI] shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to

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3. Inexplicably, the FCC has not intervened here when this case concerns a local government impinging on the FCC's authority.

> fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

Id. at 33, 1982 U.S.C.C.A.N. at 2277. Although this discussion addressed the specific statutory provision over home electronic equipment RFI, it evidences Congress's intent that the FCC have exclusive jurisdiction over RFI complaints. *See In re Freeman*, 975 F. Supp. at 574.

The BOCC argues that the amendments in the Telecommunications Act of 1996 altered the FCC's authority such that the Interference Regulation is permissible under the section entitled "Preservation of local zoning authority." 47 U.S.C. § 332(c)(7). However, section 332(c)(7) only preserves local "decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* The Conference Report on the Telecommunications Act of 1996 explains that "[t]he limitations on the role and powers of the Commission under [§ 332(c)(7)] relate to local land use regulations and are *not intended to limit or affect the Commission's general authority over radio telecommunications*, including the authority to regulate the construction, modification and operation of radio facilities." H. Rep. No. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223 (emphasis added). Thus, the 1996 amendments did not alter the FCC's general authority over radio transmissions granted by earlier communications legislation. The BOCC Interference Regulation extends

beyond traditional zoning authority (placement, construction, and modification) and into radio telecommunications, an area of FCC authority.

We also reject the BOCC's contention that its Interference Regulation is permissible under 47 U.S.C. § 253(b), added by the Telecommunications Act of 1996, that states: "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, [and] protect the public safety and welfare . . . ." *Id.* We agree with the district court that:

> Section 253, by its very title ["Removal of barriers to entry"], is designed to deal only with barriers to market entry. It is not a mechanism by which states and municipalities can regulate RFI. . . . Nothing in § 253(b) casts any doubt on federal RFI preemption. At most, the section merely preserves certain existing rights of local governing authorities which are not inconsistent with federal law.

Southwestern Bell Wireless, Inc. v. Board of County Comm'rs, No. 97-2481-GTV, slip op. at 12 (D. Kan. Aug. 28, 1998); Appellant's Br. at 404. Also, section 253(b) applies only to state, not local, regulation, since, in the remainder of section 253, Congress clearly says "State or local" when it so intends. *See* 47 U.S.C. § 253(a), (c), (d). Thus, the BOCC cannot rely on section 253(b) for any authority for its Interference Amendment.

We next examine FCC regulations regarding RFI issues. The Supreme Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985). The FCC has authority to promulgate regulations "as it may deem necessary to prevent interference between stations." 47 U.S.C. § 303(f). FCC's regulations show its broad authority over RFI issues. A function of the FCC Compliance and Information Bureau is to "[r]educe or eliminate interference to authorized communications," 47 C.F.R. § 0.111(e), with assistance from the Wireless Telecommunications Bureau, *see* 47 C.F.R. § 0.131(h). The FCC has promulgated rules to resolve interference disputes in various contexts. *See e.g.*, 47 C.F.R. §§ 22.353, 24.237, 27.58, 90.173(b), 90.403(e). The FCC can assess a fine ("forfeiture") for failure to comply with an FCC permit or license. *See* 47 C.F.R. § 1.80(a)(1), (b)(4) (suggested forfeiture amount for interference is $7000 per violation).

Finally, we look to agency decisions that address preemption of local regulation of RFI issues. As the Supreme Court stated:

> If the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

City of New York v. FCC, 486 U.S. 57, 64 (1988) (upholding FCC's choice to preempt state technical standards over cable television signals) (citation omitted). In challenges to local zoning ordinances or permit conditions that would regulate RFI, the FCC has ruled that it has exclusive jurisdiction over RFI. *See In re Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987) (invalidating local zoning ordinance regulating RFI, finding "Congress undoubtedly intended federal regulation to completely occupy [the RFI] field to the exclusion of local and state governments"); *In re 960 Radio, Inc.*, FCC 85-578, 1985 WL 193883 (Nov. 4, 1985) (finding local zoning board preempted from imposing RFI requirement on radio station in conditional use permit). The statutes and legislative history indicate that Congress does sanction FCC preemption of RFI issues. RFI is a federal interest and requires a national approach to regulate the field. *See Fetterman v. Green*, 689 A.2d 289, 294 (Pa. Super. Ct. 1997) (holding RFI "involves the resolution of technical matters ceded to the FCC due to the need for national uniformity and consensus").

This analysis is consistent with decisions of virtually all courts considering RFI preemption. *See In re Freeman*, 975 F. Supp. at 574 (finding local zoning RFI permit conditions preempted "given the FCC's pervasive regulation in this area"); *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691, 693 (Ky. 1984) (holding that police chief's remedy for interference with police broadcasts is with the FCC because power to "control, regulate, or prohibit radio transmissions" is preempted by Congress); *see also Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994) (affirming dismissal of nuisance suit regarding interference

with home electronic equipment because RFI fell within FCC's exclusive jurisdiction over radio transmission technical matters); *Still v. Michaels*, 791 F. Supp. 248, 252 (D. Ariz. 1992) (dismissing nuisance suit claiming interference from radio transmissions because "obstruction[s] to the FCC's ability to regulate radio frequencies are preempted"); *Monfort v. Larson*, 693 N.Y.S.2d 286, 288 (N.Y. App. Div. 1999) (holding tort claims preempted and "claims of radio frequency interference must be brought to the FCC . . . which has exclusive jurisdiction"); *Fetterman*, 689 A.2d at 294 (holding Congress preempted state common law claims involving RFI); *Smith v. Calvary Educ. Broad. Network*, 783 S.W.2d 533, 535 (Mo. Ct. App. 1990) (upholding dismissal of injunction action as preempted finding "that interference caused by radio transmission is . . . a technical matter and that the FCC's control thereof is exclusive"); *Still v. Michaels*, 803 P.2d 124, 125 (Ariz. Ct. App. 1990) (finding exclusive FCC regulation of RFI precludes nuisance action); *Blackburn v. Doubleday Broad. Co.*, 353 N.W.2d 550, 556 (Minn. 1984) (affirming dismissal of nuisance suit against radio stations because Congress delegated to the FCC exclusive jurisdiction over RFI regulation and preempted the claims). *But cf. Winfield Village Coop. v. Ruiz*, 537 N.E.2d 331, 333 (Ill. App. Ct. 1989) (finding no preemption of breach of contract action between landlord and tenant based on RFI claim because no state RFI regulation was involved and "dispute is private in nature").

We agree with these courts and the district court in this case that based on statutes and agency regulations and adjudications, Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field. Thus, the

Interference Amendment and Interference Stipulation are void as preempted.[4] Because we find field preemption, we need not address whether the Interference Amendment actually conflicts with federal law.

B. Tenth Amendment

The BOCC argues that preemption of the Interference Regulation violates the Tenth Amendment and federalism principles because zoning and public safety are traditional powers reserved to the states. Although the BOCC relies on *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S.

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4. The BOCC also appears to argue against preemption claiming it leaves the county without a remedy because the FCC allegedly cannot adequately address its RFI concerns. To the contrary, administrative remedies are clearly available. The BOCC can petition the FCC to resolve interference problems. *See e.g.*, 47 C.F.R. §§ 0.471, 0.473. The FCC can hold proceedings for investigation, *see* 47 C.F.R. § 1.1, issue declaratory rulings, *see* 47 C.F.R. § 1.2, and consider informal written complaints, *see* 47 C.F.R. § 1.41. The BOCC may also file petitions to deny SW Bell license or renewal applications filed with the FCC. *See* 47 U.S.C. § 309(d); 47 C.F.R. §§ 26.320, 27.320. After taking such action, aggrieved parties may seek review of FCC decisions and orders in the United States Court of Appeals for the District of Columbia Circuit. *See* 47 U.S.C. § 402(b)(6). In addition, the FCC recently announced Memoranda of Understanding between the FCC Compliance and Information Bureau, the FCC Wireless Telecommunications Bureau, the Industrial Telecommunications Association, and the Association of Public Safety Communications Officials "to dramatically streamline the Commission's compliance and enforcement process in the resolution of interference complaints." FCC Compliance and Information Action, Rept. No. CI 98-7, 1998 WL 207911 (Apr. 29, 1998); Rept. No. CI 98-12, 1998 WL 396675 (July 17, 1998).

707 (1985), the case does not support their argument. The Supreme Court in *Hillsborough* upheld a county ordinance regulating health — an area of traditional state power — despite federal regulation in the area. However, the Court found no implied preemption because the federal agency explicitly stated its intention *not* to preempt state and local regulations. *See id.* at 714, 716. Thus, *Hillsborough* is inapplicable here because the FCC has explicitly stated its intention *to preempt* local regulations on RFI, *see In re Mobilecomm*, 2 F.C.C.R. 5519; *In re 960 Radio*, FCC 85-578, 1985 WL 193883, and the statutes and legislative history support Congress's intent to occupy the field of RFI issues.

"[H]istoric police powers of the States" are not to be preempted by federal law "unless that was the clear and manifest purpose of Congress." *Mortier*, 501 U.S. at 605 (quoting *Rice*, 331 U.S. at 230). However, as the Supreme Court has noted, preemption principles apply even to a "matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (evaluating preemption of state real property law) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Although the BOCC characterizes the issue as local police power, RFI regulation is not a traditional local interest but a national interest preempted by federal legislation. Congress can regulate communications pursuant to the Commerce Clause. *See FCC v. League of Women Voters*, 468 U.S. 364, 375 (1984). Indeed, as the BOCC concedes, the local police and fire departments obtain their

communication licenses from the FCC. A patchwork of varied local regulations across the country would prevent a functional national telecommunications network. Thus, federal preemption of RFI regulation does not violate the Tenth Amendment.

C. Limit of District Court's Order

We reject the BOCC's contention that the district court erred by concluding that federal law preempted the entire zoning regulation rather than limiting its ruling to specific provisions. The district court order is limited to the specific relief sought in SW Bell's Complaint and Motion for Summary Judgment, i.e. that the Interference Amendment, art. 23, § 6(B)(4)(f), and the Interference Stipulation, OL-CU-1714, Stipulation No. 15, are void. Contrary to the BOCC's suggestion, the court could not read the Interference Regulation narrowly so as to be consistent with federal law because the field of RFI regulation is entirely preempted by federal legislation.

D. Issue of Material Fact

Also, we reject the BOCC's assertion that the district court erred by finding no genuine issue of material fact. The BOCC argues discovery was incomplete, the court failed to consider issues of material fact, and "the Court clearly drew inferences of fact favorably for SW Bell rather than the County as the nonmoving party." Appellant's Br. at 10. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly

preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On the determinative issue of preemption, the material facts regarding the Interference Amendment, Interference Stipulation, and federal communications laws and regulations are not in dispute and, thus, no further discovery is necessary.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-3264

SOUTHWESTERN BELL WIRELESS INC., fka Southwestern Bell Mobile Systems, Inc., as General Partner of Kansas City SMSA Limited Partnership; and KANSAS CITY SMSA LIMITED PARTNERSHIP,

Plaintiffs – Appellees,

v.

JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant – Appellant.

JUDGMENT

Filed December 27, 1999

Before **ANDERSON, McWILLIAMS,** and **BALDOCK,** Circuit Judge.

This case originated in the District of Kansas and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: s/ L. Balzano
Deputy Clerk

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND FILED AUGUST 28, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. 97-2481-GTV

SOUTHWESTERN BELL WIRELESS, INC. f/k/a SOUTHWESTERN BELL MOBILE SYSTEMS, INC., as general partner of Kansas City SMSA Limited Partnership, and KANSAS CITY SMSA LIMITED PARTNERSHIP,

Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS
OF JOHNSON COUNTY, KANSAS,

Defendant.

CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION,

Amicus Curiae.

MEMORANDUM AND ORDER

Plaintiffs bring this action seeking to invalidate certain zoning regulations of Johnson County, Kansas involving

communication towers and antennae. Plaintiffs insist that the regulations are preempted by federal law and thus void *ab initio*. The case is before the court on plaintiffs' motion for summary judgment (Doc. 20). For the reasons set forth below, the motion is granted.

I. Background

The following facts are either uncontroverted or viewed in a light most favorable to the defendant. Immaterial facts are omitted.

Plaintiff Southwestern Bell Wireless, Inc. has a license from the Federal Communications Commission ("FCC") to construct and operate a wireless telecommunications network within the Kansas City metropolitan area. In March 1997, acting on behalf of two individuals residing in unincorporated Johnson County, Kansas, a Southwestern Bell attorney filed an application with the planning staff of the Johnson County Board of County Commissioners requesting a conditional-use permit for Southwestern Bell to erect a 150-foot monopole communications tower on the couple's property. The planning staff scheduled a public hearing before the Olathe Township Zoning Board to consider the application.

Prior to the hearing, the planning staff prepared a report in which it recommended approval of the application subject to certain stipulations. At issue here is the stipulation entitled "Interference with Public Safety Communications." This provision mirrors a zoning amendment adopted by the Johnson County Board of County Commissioners in June 1997. Under the regulation, communication towers, antennae,

and all associated site equipment cannot be located or operated in a manner that interferes with, disrupts, or degrades public safety communications.[1] (*See* Def.'s Resp., Ex. B at 16-18) (quoting Johnson County Zoning and Subdivision Regs., art. 23, § 6(B)(4)(f)). The regulation also vests the county's zoning administrator with authority to determine when interference, disruption, or degradation exists. (*Id.* at 17). If, after being informed of the interference, the conditional-use permit holder does not remedy the problem within twenty-four hours, the zoning administrator, upon proper notice and an opportunity for a hearing, may force the permit holder to cease operations. (*Id.*).

In July 1997, after securing a copy of the planning staff's report, David Furth, the chief of the FCC's Commercial Wireless Division (a branch of the Wireless Telecommunications Bureau), directed a letter to Roger Kroh, the director of planning and development for the Johnson County Office of Planning, Development, and Codes. In that correspondence, Furth opined that the Johnson County zoning regulations dealing with interference of public safety communications are preempted by the Communications Act of 1934. (Pls.' Compl., Ex. D). He cited relevant legislative history and noted that the FCC has specific procedures in place to handle public safety interference complaints. (*Id.*).

Apparently declining to follow the FCC's legal interpretation, the Johnson County Board of County Commissioners voted in August 1997 to approve the

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1. Public safety communications include, but are not limited to, fire, police, and emergency services.

conditional-use permit application filed by Southwestern Bell subject to the stipulation regarding interference with public safety communications. Construing the stipulation as an adverse action of local government, plaintiffs responded by filing this lawsuit requesting the court to declare the public safety interference provision of the regulation void and to enjoin its enforcement.[2]

II. Standards

In deciding a motion for summary judgment, the court must examine any evidence tending to show triable issues in the light most favorable to the nonmoving party. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984). A moving party is entitled to summary judgment only if the evidence indicates "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine factual issue is one that "can reasonably be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once

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2. Because the stipulation in plaintiffs' conditional-use permit adversely affected their ability to operate their wireless telecommunications network, the court has jurisdiction over this dispute pursuant to 47 U.S.C. § 332(c)(7)(B)(v).

the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.*

III. Discussion

The Supremacy Clause of the Constitution, U.S. Const., art. VI, cl. 2., authorizes the federal government to preempt state laws to the extent necessary to achieve its purposes. *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Preemption may be effectuated through both federal statutes and federal regulations properly adopted in accordance with statutory authorization. *Id.* The "ultimate touchstone" of preemption analysis is congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The Supreme Court has identified three scenarios in which federal law preempts state law:

(1) "when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law;"

(2) "when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has

thereby left no room for the States to supplement federal law;" and

(3) "when compliance with both state and federal law is impossible or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984) (citations omitted); *accord Cipollone*, 505 U.S. at 516.

Plaintiffs contend that the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, preempts the Johnson County zoning amendment restricting the operation of communication towers and antennae. The court agrees. Contrary to the arguments of plaintiffs and amicus, however, preemption is not express; it is only implied.

A. Express Preemption

In support of their express preemption theory, plaintiffs point to several sweeping jurisdictional statements in the Communications Act. They note, for example, that Congress created the statute "[f]or the purpose of regulating interstate . . . commerce in communication by wire and radio." 47 U.S.C. § 151 (Supp. 1998). Citing a licensing provision of the statute, they also observe that the Act was designed "to maintain the control of the United States over all channels of radio transmission." *Id.* § 301. They further highlight an enabling clause vesting the FCC with the power to "[m]ake

such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the [Act]." *Id.* § 303(f).

The problem with plaintiffs' arguments is that preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act." *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 429-30 (1963). The preemption inquiry must focus on the particular facts of the case. *Id.* at 430. It is undisputed that Congress delegated authority to the FCC to regulate matters involving radio frequency interference ("RFI"). The question here is whether Congress intended the FCC's jurisdiction to be exclusive. The Communications Act contains no *express* provision on that issue. *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994); *In re Appeal of Freeman*, 975 F. Supp. 570, 573 (D. Vt. 1997); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550, 554 (Minn. 1984). Accordingly, the court must examine whether federal law impliedly preempts state law.

B. Implied Preemption

"[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)). Noting the historic

presumption against preemption, defendant seeks to apply the doctrine as narrowly as possible here. In doing so, defendant suggests that the court must confine its analysis to explicit congressional edicts. The Supreme Court, however, has rejected such a narrow approach:

> [I]n a situation where state law is claimed to be pre-empted by federal regulation, a narrow focus on Congress' intent to supersede state law is misdirected for a pre-emptive regulation's force does not depend on express congressional authorization to displace state law. Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. . . . [I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

City of New York, 486 U.S. at 64 (citations and internal alterations omitted).

Appendix B

In *Cipollone*, the Court reaffirmed its position that "[i]n the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." 505 U.S. at 516 (citations omitted). The controverted Johnson County zoning ordinance satisfies both criteria for preemption.

1. Field Occupied by Federal Law

In adopting the Communications Act, Congress conferred upon the FCC "comprehensive powers to promote and realize the vast potentialities of radio." *National Broad Co. v. United States*, 319 U.S. 190, 217 (1943). Determining that national uniformity is necessary in such a role, the Supreme Court has interpreted the statute to vest the FCC with exclusive jurisdiction over "technical" issues such as radio frequency. *See Head*, 374 U.S. at 430 & n.6. Legislative history bolsters the Court's analysis. In 1982, for example, Congress amended the Communications Act to authorize the FCC to establish minimum performance standards for home electronic systems and equipment susceptible to RFI. *See* Pub. L. No. 97-259, 96 Stat. 1091 (codified as amended at 47 U.S.C. § 302a(a)(2)). The House Conference Report to the bill explicitly stated that the amendments were:

> intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be

> subject to local or state regulation as part of any effort to resolve an RFI complaint.

H.R. Conf. Rep. No. 97-765, at 40 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2277. In the aftermath of the 1982 amendments, several courts have dismissed lawsuits based on nuisance theories claiming that radio signals interfered with home electronic equipment. *See Broyde*, 13 F.3d at 997-98; *Freeman*, 975 F. Supp. at 574-75; *Still v. Michaels*, 791 F. Supp. 248, 252-53 (D. Ariz. 1992); *Blackburn*, 353 N.W.2d at 552-55.

Defendant insists that the 1982 amendments' sole focus on home electronic equipment suggests that the Communications Act has no preclusive effect on local regulation of RFI with public safety communications. Such a narrow interpretation is not dictated by the amendments. As the *Freeman* court recently noted:

> With the enactment of the Communications Amendments Act of 1982, which amended § 302a to provide for the establishment of performance standards for home electronic equipment, Congress clarified that the FCC had the power to regulate not only the transmitters of RFI, but the devices in the home that are susceptible to RFI. . . .
>
> Section 302a does not, expressly or by implication, authorize state or local regulation of the source of radio frequency interference. And although Congress limited the FCC to establishing

> performance standards for home electronic devices instead of for all electronic devices which might be susceptible to RFI, it emphasized that all RFI complaints were to be handled through the Commission.

975 F. Supp. at 573-74 (internal footnotes omitted); *accord In the Matter of 960 Radio, Inc.*, FCC 85-578, at ¶ 7 (Nov. 4, 1985) (available at 1985 WL 193883) ("[F]ederal power in the area of [RFI] is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted.").[3]

Defendant further argues that the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, altered the legal landscape. Defendant specifically points to section 704 of the 1996 Act. That provision, which was designed to preserve local zoning authority, underscores that the amended Communications Act does not "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the *placement, construction, and modification* of personal wire-less service facilities."[4] 47 U.S.C. § 332(c)(7)(A) (emphasis added). To the extent that this statute represented a change in the law, it in no way insulates the zoning ordinance at issue here. As the House Conference Report explained:

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3. The court must accord deference to the FCC's interpretation pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

4. This preservation of local zoning authority is subject to certain exceptions, none of which are applicable here.

Appendix B

> The limitations on the role and powers of the [FCC] under [section 704] relate to local land use regulations and are not intended to limit or affect the [FCC's] general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

H.R. Conf. Rep. No. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.

The controverted Johnson County ordinance focuses not on placement, construction, and modification issues but on operational matters. It erects performance standards and authorizes municipal officials to shut down telecommunications towers for lack of compliance. Defendant's protestations notwithstanding, the ordinance expressly prohibits RFI with public safety communications, thereby exceeding the limited regulatory authority preserved to states and municipalities in the Telecommunications Act of 1996.

Finally, defendant avers that the Communication Act's "savings clause," codified at 47 U.S.C. § 253(b), specifically permits local regulation of public safety and welfare issues. That section states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and

> welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b). Section 253, by its very title, is designed to deal only with barriers to market entry. It is not a mechanism by which states and municipalities can regulate RFI. Moreover, the court will not interpret isolated preemption clauses out of context. The court must evaluate such provisions in light of a statute's overall language and legislative history as well as the need for national uniformity. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986). Nothing in § 253(b) casts any doubt on federal RFI preemption. At most, the section merely preserves certain existing rights of local governing authorities which are not inconsistent with federal law.

2. Conflict with Federal Law

The court also believes that the Johnson County zoning ordinance conflicts with federal law. A conflict between state and federal law arises "when 'compliance with both federal and state regulations is a physical impossibility' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Fuller v. Norton*, 86 F.3d 1016, 1025-26 (10th Cir. 1996) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982)).

The FCC has delegated authority to its Compliance and Information Bureau as well as its Wireless Bureau to develop and coordinate programs and rules to ensure the interference-

free operation of wireless telecommunications equipment and networks. *See* 47 C.F.R. §§ 0.111(e) & 0.131(h) (1997). Pursuant to this authority, the bureaus have implemented procedures to resolve RFI disputes involving cellular and other wireless licensees, *see id.* § 22.353, personal communications services operations, *see id.* § 24.237, and private radio stations, *see id.* §§ 90.173(b) & 90.403(e). For those telecommunications providers who transgress the Commission's regulations, the FCC has a panoply of remedial options ranging from fines (classified as "forfeitures" in the FCC's nomenclature) to forced cessation of operations. Johnson County must avail itself of those remedies if it believes that permit holders within its jurisdiction are interfering with public safety communications. *See Broyde*, 13 F.3d at 998 (grievances regarding RFI must be lodged with FCC via written complaint or petition to deny license/renewal application).

If states and municipalities were permitted to adopt RFI restrictions, the FCC's ability to carry out its statutory mandate of administering a "unified and comprehensive regulatory system" for the telecommunications industry would be seriously impeded. *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940). Licensees would be subjected to conflicting legal obligations and the FCC's compliance divisions would be relegated to an advisory role. With respect to Johnson County's ordinance, the zoning administrator could shut down the operations of a permit holder whose tower interferes with public safety communications even if the permit holder is in full compliance with FCC rules and regulations. The court does not dispute that defendant has a legitimate interest in enacting regulations necessary to

perform its governmental functions. Defendant cannot invoke that principle, however, in contravention of federal law. *See de la Cuesta*, 458 U.S. at 152 ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."). The fact that Johnson County may be able to resolve RFI disputes more expeditiously than the FCC is simply not germane to the court's inquiry.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiffs' motion for summary judgment (Doc. 20) is granted.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 28 day of August 1998.

s/ G.T. VanBebber
G. Thomas VanBebber
United States District Judge